Petition

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ALEXANDER L. STEVAS,
CLERK

81-209

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

CLAYTON MANUFACTURING CORPORATION,

Petitioner,

v.

LEON MOORER, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
OF THE STATE OF ARIZONA
DIVISION TWO

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July 20, 1981

QUESTIONS PRESENTED

Whether the commerce clause of the United States Constitution, Art. 1, Sec. 8, cl. 3, requires national, uniform regulation of the law of products liability because conflicting state actions have the effect of restraining the substantially free flow of interstate commerce.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE STATE OF ARIZONA DIVISION TWO

The petitioner Clayton Manufactuing Corporation respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Arizona, Division Two, entered in this proceeding on March 2, 1981.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the Arizona Supreme Court.

JURISDICTION

The judgment of the Court of Appeals, Division Two, State of Arizona, was entered on March 2, 1981, affirming the judgment of the trial court in favor of the respondent. The Court of Appeals denied a timely petition for rehearing on April 2, 1981. Thereafter, on April 21, 1981, the Supreme Court of Arizona denied a petition for review and a petition for reconsideration was later denied by the Supreme Court of Arizona on May 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the commerce clause of the

United States Constitution, Art. I, Sec. 8, cl. 3, requires national, uniform regulation of the law of products liability because conflicting state actions have the effect of restricting the substantially free flow of interstate commerce.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Art. I, Sec. 8, cl. 3: To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

STATEMENT OF THE CASE

Leon Moorer brought suit against Clayton Manufacturing Corporation in Pima County Superior Court in Tucson, Arizona for injuries sustained while working at an automobile emissions control facility. Petitioner Clayton Manufacturing Corporation manufacturers dynamometers which are machines used in testing automobile emissions. Testing is performed by

driving the vehicle to be tested onto the dynamometer so that the rear wheels of the vehicle rest on the rotating drum of the dynamometer. The automobile engine is started, and its wheels rotate on top of the rollers of the dynamometer and the car is run at different speeds while its emissions are tested. The tester inserts a probe into the exhaust pipe of the car and the automobile emissions are measured by a computer which is connected to the probe. Respondent Moorer was injured when he placed the probe into the exhaust pipe of a truck. The pipe was located between the front and rear wheels on the driver's side. Respondent was trying to reinsert or readjust the emissions testing probe when his arm somehow became caught between the left rear wheel of the vehicle being tested and the rollers of a dynamometer manufacturered by petitioner.

Respondent's suit against Clayton Manufacturing Corporation initially was based both on theories of negligence and strict liability but respondent abandoned his negligence claim during trial and the case reached the jury solely under strict liability theory of recovery. Respondent's claim against petitioner was that the dynamometer was defectively designed in that there was no safety guard on the dynamometer which would prevent a person from getting his arm caught between the spinning wheels of a vehicle being tested and the rotating rollers of the dynamometer. Therefore this case falls into the category of "design defect" products liability cases rather than "manufacturing defect" cases. Basically, the difference between a design defect case and a manufacturing defect case is that in a design defect case the product is manufactured exactly as planned and any

defect would affect the entire line of the product but a manufacturing defect occurs when the product is not produced in the same form as it was planned. A manufacturing defect would affect only a limited number of a particular product.

Clayton Manufacturing Corporation is the largest manufacturer of dynamometers in the United States. The dynamometer involved in this case was manufactured in 1975 and did not contain a safety guard of the type envisioned by respondent at trial but no dynamometer manufactured in 1975 had a safety guard and even today no dynamometer is equipped with a safety guard.

At trial and on appeal petitioner argued that in a design defect case, when the "reasonable expectation of the consumer" test cannot be applied, in this case because no reasonable consumer could expect a dynamometer to have a safety

guard when no dynamometer has ever been manufactured which does have a safety guard, the case must be judged upon negligence principles, and the standard to be applied must be that of the "reasonably prudent manufacturer". Petitioner also pointed out the conflict present among the jurisdictions regarding product liability law.

The trial court and the Court of Appeals rejected petitioner's argument. A jury returned a $35,00 verdict against Clayton Manufacturing Corporation and the verdict was upheld on appeal.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE COURT OF APPEALS OF THE STATE OF ARIZONA, DIVISION ONE, WHICH CONFLICT WITH THE CALIFORNIA DECISION OF BARKER v. LULL ENGINEERING CO., INC., 20 Cal.3d 413, 143 Cal.Rptr. 225, 573 P.2d 443 (1978).

The decision of the Court of Appeals in this case conflicts with the decisions

of Division One of the Court of Appeals of Arizona of Brady v. Melody Homes Manufacturer, 121 Ariz. 253, 589 P.2d 896 (App. 1978), and Vineyard v. Empire Machinery Co., 119 Ariz. 502, 581 P.2d 1152 (App. 1978). Both the Brady and Vineyard decisions, written by Judge Eino Jacobsen state that a product is defective in design if, and only if, there is evidence that the product failed to perform as safely as the ordinary consumer would anticipate. If the reasonable expectation of the consumer test cannot be applied to the facts of a particular design defect case because the ordinary consumer has no idea how safe the product can be made, then strict liability does not apply to the case and the plaintiff must prove his case under standard negligence principles. We submit that the reasonable expectation of the consumer test does not apply to the

dynamometer, and therefore, the plaintiff, respondent herein, should have been required to prove his case under negligence rather than under strict liability.

The Brady court explicitly rejected the "compensation" concept that is being approached in California, and took the position that Arizona still maintains the "tort" concept. In Barker v. Lull Engineering Company, Inc., 20 Cal.3d 413, 143 Cal.Rptr. 225, 573 P.2d 443 (1978), California outlined its compensation approach. In California, all one must prove is that the plaintiff was injured by his use of a product, and then it becomes the defendant's burden to prove that on balance, the benefits of the challenged design outweigh the risk inherent in the design. The Arizona Court of Appeals, Division Two,in this case appears to favor the California

approach and rejects the tort concept approach enunciated in Vineyard and Brady.

These conflicts justify the grant of certiorari to review the judgment below.

2. THE CONFLICT AMONG THE JURISDICTIONS REGARDING THE LAW OF PRODUCTS LIABILITY CAUSES SIGNIFICANT AND RECURRING PROBLEMS FOR PRODUCT MANUFACTURERS ENGAGED IN INTERSTATE COMMERCE.

The conflict among the jurisdictions regard the law of products liability places manufacturers engaged in interstate commerce in the untenable position of being forced by the conflict to market a slightly different product in each jurisdiction depending on the approach it takes to products liability cases, or choosing not to market its product in certain states altogether. For Clayton Manufacturing Corporation, which sells

dynamometers in both Arizona and California, as well as in many other states, the conflict among the jurisdictions presents a real impediment to nationwide marketing of the dynamometer. The conflict of law regarding products liability cases between the states is a burden on interstate commerce. The law of products liability is a subject which requires uniformity of law nationwide because the conflicts among state courts have the effect of impeding the substantially free flow of commerce from state to state.

It is axiomatic that the commerce clause provides some protection from state action which inimical to national commerce. Where uniform regulation is necessary to provide for the free flow of commerce, the states are prohibited from taking action which materially restricts the

free flow of commerce. Southern Pacific Co. v. Arizona ex rel Sullivan, 325 U.S. 761 (1945); California v. Zook, 336 U.S. 725 (1949).

There are some subjects which demand national, uniform regulation rather than diverse regulations which vary from state to state. Cooley v. Board of Wardens, 12 How. 299, 319 (1852). A unified national scheme of regulation of products liability law is needed so that manufacturers can market their products nationwide and be assured that they will be judged by the same standards in all state courts. See, Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). The very existence of conflicting laws among the states on the subject of products liability is discriminatory against interstate commerce in violation of the commerce clause of the United States

Constitution, Art. I, Sec. 8, cl. 3. Raymond Motor Transportation, Inc.,et al v. Rice, Secretary, Department of Transportation of Wisconsin, et al, 434 U.S. 429 (1978).

Finally, the correctness of the decision below is open to serious question. Factually, this case is very similar to the Vineyard and Brady cases. In Vineyard, the allegedly defective design was for lack of roll bar on an earth mover and in Brady the alleged defect in design was the lack of smoke indicators in a mobile home. In the Vineyard case, the plaintiff himself was well aware of the fact that the piece of equipment could tip over if it were driven on a slope, and that there was no roll bar there to protect him. In light of those facts, the court held as a matter of law that no ordinary consumer could expect that a

person driving the equipment could not be injured if the equipment turned over. In other words, no one could say that the plaintiff, or any other "ordinary consumer" would expect that he would somehow be saved by some device on the earth mover if the earth mover tipped over. He well knew that if the earth mover tipped over, there was nothing there to protect him. Consequently the court held as a matter of law that the plaintiff had not presented sufficient evidence to go to the jury.

In the Brady case, the court noted that when the mobile home in question was manufactured, smoke detectors were not in general use, and that any consumer who bought the mobile home then in 1964 could not expect the mobile home to have a smoke detector. Since there was no evidence that there was reasonable anticipation upon the part of the consumer that there

would be some warning given to him in case of fire, the court again held as a matter of law that there was no evidence of a defect in products liability and instead left the plaintiff to a claim in negligence. In the instant case, the plaintiff, respondent herein, testified that he was well aware of the fact that there was a danger when the wheels of the vehicle on the dynamometer were spinning, and he also testified that he was aware that there was nothing to protect him in case he put his hand or arm near a spinning wheel. Again, there was no evidence that he expected or anticipated some sort of safety device, such as a shield or guard to magically appear in front of the spinning wheel in case he put his hand there.

There is no way to effectively distinguish this case from Brady and Vineyard. Brady and Vineyard say that

in a design defect case the absence of safety devices may be so obvious that as a matter of law a defect "unreasonably dangerous" is not present. Certainly the absence of a safety device on the dynamometer was obvious. Every witness who testified at trial except for two physicians, testified that the situation presented by the spinning wheel of an automobile on top of a roller of a dynamometer created a dangerous situation. There is no evidence that an ordinary consumer would expect a safety device to be present on the dynamometer when it is obvious to anyone that there was none, and in fact since the plaintiff testified that he was aware of the danger, knew there was no safety device and only approached the wheel because he thought it was stopped. There is simply no evidence at all to go to a jury on the

issue of strict liability under Restatement of Torts 2d §402A.

Brady points out the clear distinction between strict liability and negligence. Strict liability concerns a defect which is ascertained by an objective standard in determining whether the product failed to perform as the ordinary consumer or user would expect it to perform. If liability is to be imposed on the ground that it was feasible for the manufacturer to make it safer, then the inquiry becomes one decided on normal principles of negligence. The only evidence in this case was that the dynamometer could have been made "safer" by placing guards on it. That is negligence evidence, not strict liability evidence. The evidence in the instant case was clear that no dynamometer manufactured in the world has such a safety device. If Judge Jacobsen, in the Brady

case, said that no reasonable consumer would have contemplated that a mobile home manufactured in 1964 would contain smoke detectors, then shouldn't a court today say that no reasonable user of a dynamometer would expect that dynamometer, manufactured in 1975 to have a safety guard?

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the State of Arizona, Division Two.

Respectfully submitted,

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July 20, 1981

APPENDIX

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

LEON MOORER, Plaintiff/Appellee, v. CLAYTON MANUFACTURING CORPORATION, a foreign corporation, Defendant/Appellant.	)	2CA-CIV 3732 OPINION

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. 173669

Honorable Robert B. Buchanan, Judge

AFFIRMED

HARALSON, KINERK & MOREY, P.C.
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H O W A R D, Judge

This products liability case resulted in a $35,000 jury verdict in appellee's favor. Appellant contends the trial court erred in (1) not granting its motion for judgment n.o.v. because appellee failed to prove his case under the law set forth in Brady v. Melody Homes Manufacturer, 121 Ariz. 253, 589 P.2d 896 (App. 1978); (2) misinstructing the jury; (3) allowing appellee's expert witness to testify; (4) refusing to grant a new trial when the verdict was based on passion and prejudice; (5) refusing to grant a remittitur, and (6) refusing to grant a new trial because of jury misconduct. We find no error and affirm.

Appellee was an employee of Hamilton Test Systems Emission Control Center (Hamilton) which conducts vehicle emission tests for the State of Arizona. The

machine used for the test is called a dynamometer and is manufactured by appellant.

The test is conducted by driving the vehicle into the test position, with the rear wheels on a rotating drum. One of the two persons who usually conducts the test enters the vehicle and starts the engine, while the other inserts a probe into the exhaust pipe. This probe is connected to a computer. During testing the vehicle is run at different speeds and the rear tires rotate on the drum.

On the date of the accident, appellee had inserted the probe into the exhaust pipe of a truck. The pipe was located between the front and rear wheels on the driver's side. As the test cycle was proceeding, appellee noticed that the probe had slipped out. When he tried to reinsert it, he was caught in the "nip-

point" created by the rotation of the tire and the drum. He was dragged underneath the vehicle and his right arm was trapped and crushed between the tire and the drum. The only way in which his arm could be extracted was by putting the truck into reverse which re-rolled his arm between the tire and the drum. He suffered numerous compound fractures to his arm as a result.

Appellee's theory was that of strict liability for a design defect which consisted of the failure to have a safety guard to prevent his arm from getting caught in the "nip-point" and the failure to provide a device which would have permitted him to extract his arm after it had become trapped without the necessity of re-rolling it between the tire and the drum.

I

DID APPELLEE PROVE A STRICT LIABILITY CASE?

In Brady v. Melody Homes Manufacturer, supra, the court considered a design defect case. Borrowing from the California case of Barker v. Lull Engineering Company, Inc., 20 Cal.3d 413, 143 Cal.Rptr. 225, 573 P.2d 443 (1978), the Brady court adopted the Barker dual standard for design defect cases. A product is defective in design if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Design defect under this standard is based on strict liability under the Restatement (Second) of Torts, Sec. 402A.

A product is also defective in design if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove, in light of the relative factors, that on balance the

benefits of the challenged design outweigh the risk inherent in such design. Barker called it a "risk-benefit" standard. In discussing these standards the Barker court stated:

> "This dual standard for design defect assures an injured plaintiff protection from products that either fall below ordinary consumer expectations as to safety, or that, on balance, are not as safely designed as they should be. At the same time, the standard permits a manufacturer who has marketed a product which satisfies ordinary consumer expectations to demonstrate the relative complexity of design decisions and the trade-offs that are frequently required in the adoption of alternative designs. Finally, this test reflects our continued adherence to the principle that, in a product liability action, the trier of fact must focus on the product, not on the manufacturer's conduct, and that the plaintiff need not prove that the manufacturer acted unreasonably or negligently in order to prevail in such an action." 573 P.2d at 446-447.

Whereas Barker held that the "risk-benefit" standard also sounds in strict

liability, Brady held that it does not and stated that it is based on standards of negligence.[1/] We need not state here whether we agree with this apparent retreat from the doctrine of strict liability since we believe that the facts here establish the applicability of strict liability under the first standard. The failure to include safety devices at the "nip-point" can constitute a defective condition unreasonably dangerous to the user or consumer. See Union Supply Company v. Pust, 196 Col. 162, 583 P.2d 276 (1978). We are unable to agree with appellant's contention that this was a negligence case and that appellee did not sustain his burden of proof because he failed to prove negligence. Neither do we agree with appellant's

1/ Alaska has adopted Barker and refused to reinstate negligence terminology into design defect cases. See Caterpillar Tractor Company v. Beck, 593 P.2d 871 (Alas. 1979); Heritage v. Pioneer Brokerage & Sales, Inc., 604 P.2d 1059 (Alas. 1979).

contention that appellee did not sustain his burden of proof since no one testified that the machine failed to perform as safely as an ordinary consumer would reasonably expect it to when the product was being used in an intended or reasonably foreseeable manner. Appellee's expert witness testified that the "nip-point" made it hazardous. The jury saw pictures of the machine and heard testimony describing how the emissions control test was performed and how the accident happened. Whether the design there satisfied the strict liability standard was a question of fact for the jury. See Byrns v. Riddell, Incorporated, 113 Ariz. 264, 550 P.2d 1065 (1976). Cf. Union Supply Company v. Pust, supra.

Appellant contends that the open and obvious lack of safety devices precludes the invocation of the doctrine of

strict liability. Its reliance on Vineyard v. Empire Machinery Company, Inc., 119 Ariz. 502, 581 P.2d 1152 (App. 1978), is misplaced. Vineyard is factually distinguishable. The open and obvious nature of a defect is only one of the factors to be considered and is not controlling. Byrns v. Riddell, supra.

II

THE MULTIPLE CAUSATION INSTRUCTION

During the trial appellant attempted to shift the blame to Hamilton, arguing that it failed to properly train appellee and that this negligence was the proximate cause of appellee's injuries. This prompted appellee to request and receive, over appellant's objection, the following jury instruction:

> "More than one person may be liable for causing an injury. A defendant may not avoid liability by claiming that some other person helped cause the injury."

Appellant contended below that the instruction was erroneous because there cannot be multiple causation in a strict liability case. We do not agree. Product defectiveness can be a proximate cause concurrently and in combination with other causes. Vlahovich v. Betts Machine Company, 101 Ill.App.2d 123, 242 N.E.2d 17 (1968), aff'd 45 Ill.2d 506, 260 N.E.2d 230 (1970). The instruction was appropriate in view of appellant's trial tactics.

Appellant also suggests that the alleged negligence of Hamilton was a superceding, intervening cause precluding the giving of the above instruction. We do not decide the applicability of this theory in relation to a strict liability case nor its applicability in the factual setting of this case since it was not specified in the trial court as an objection to the instruction. Rule 51(a), Arizona Rules of Civil Procedure, 16

A.R.S.; Hurvitz v. Coburn, 117 Ariz. 300, 572 P.2d 128 (App. 1977).

III

THE "STATE OF THE ART" INSTRUCTION

One of appellant's expert witnesses was allowed to testify that with regard to protective devices, the dynamometer conformed to the "state of the art" at the time it was manufactured. At first appellee objected to this testimony but the objection was withdrawn when it was pointed out that A.R.S. Sec. 12-683(1) allows such testimony as an affirmative defense. When appellee later realized that the statute did not apply to causes of action accruing prior to the effective date of the act, such as was the case here, he succeeded in having the trial court instruct the jury that "state of the art" was not a defense.

Appellant contends that the giving of

this instruction was erroneous since A.R.S. Sec. 12-682 preserves the common law of products liability except as specifically modified by the act. It asserts there was no common law in Arizona on "the state of the art" prior to the act and cites cases from other jurisdictions which allow the defense in products liability cases. Appellant is in error as to the state of the law in Arizona prior to the enactment of our new products liability statutes. The "state of the art" defense was rejected by this court in Wagner v. Coronet Hotel, 10 Ariz.App. 297, 458 P.2d 390 (1969) and again in Lunt v. Brady Manufacturing Company, 13 Ariz. App. 305, 475 P.2d 964 (1970). A.R.S. Sec. 12-683(1) has changed this law but is not applicable to this case and the trial court did not err in its instruction.

IV

EXPERT WITNESS TESTIMONY

Appellant next contends that the trial court erred in allowing Alan Milner, an engineer, to testify as an expert witness because he had never designed a dynamometer. We do not agree. Whether a witness is competent to testify as an expert is a matter for the sound discretion of the trial court and we will not overrule its decision unless there is a clear abuse of discretion. Englehart v. Jeep Corporation, 122 Ariz. 256, 594 P.2d 510 (1979). The evidence given by the expert witness in this case concerned the application of mechanics and physics which would be within the expertise of someone with an engineering degree.

V

DAMAGES

Appellant contends that since the

special damages, i.e., medical expenses and lost wages, amounted to only $6,000 the verdict of $35,000 was a result of passion and prejudice. In its brief appellant states:

> "***The mere ratio of the amount of the verdict to the amount of actual damages is such as to show that the verdict could only have been reached by a jury inflamed with passion and prejudice."

This argument is without merit. There is no magic formula which tests the excessiveness of damages nor any rule-of-thumb ratio such as appellant suggests. The amount of special damages proves only one thing, the amount of special damages. Each case turns on its own facts. Appellee's arm was crushed by the machine. He is permanently scarred by surgery, his little finger is deformed and his arm is limited in range of motion. The damages were not excessive and the court

did not err in refusing to grant a new trial or grant a remittitur.

VI

JURY MISCONDUCT

In its motion for a new trial, appellant attached the affidavits of two of the jurors which it claims shows the verdict was a quotient verdict. It contends the trial court erred by failing to grant a new trial on this ground. We do not agree. While quotient verdicts are improper, the trial court cannot receive testimony from a juror, whether by affidavit or orally, to impeach the verdict. Wasko v. Frankel, 116 Ariz. 288, 569 P.2d 230 (1977); Gorski v. J.C. Penney Company, 103 Ariz. 404, 442 P.2d 851 (1968); Hull v. Larson, 14 Ariz. 492, 131 Pac. 668 (1913); Johnson v. Harris, 23 Ariz.App. 103, 530 P.2d 1136 (1975); Rule 606(b), Arizona Rules of Evidence.

Affirmed.

LAWRENCE HOWARD, Judge.

CONCURRING:

JAMES D. HATHAWAY, Chief Judge

BEN C. BIRDSALL, Judge.

Opposition

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CITATIONS:

CASES:

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STATEMENT OF THE CASE

Respondent agrees with petitioner's general statement of the case, but would add the following:

1. As respondent, Mr. Moorer was inserting an emission probe into a vehicle's exhaust pipe, the hose connected to

the probe got entrained in the vehicle's spinning tire and the spinning dynamometer roller and pulled Moorer's arm in underneath and between the wheel and roller.

2. Respondent's claim was based not only on the absence of a safety guard in front of the "pinch point" but also on the fact that there was no device on the dynamometer to extricate Moorer's arm when it became entrained.

3. To get Moorer out from under the tire and roller, his co-workers had to put the vehicle in reverse and spit Moorer's arm back out crushing it a second time.

ARGUMENT

1. THERE IS NO CONFLICT BETWEEN THE DECISION IN THIS CASE AND THE DECISIONS OF THE ARIZONA COURT OF APPEALS, DIVISION ONE, IN BRADY AND VINEYARD AND THE DECISION OF THE CALIFORNIA SUPREME COURT IN BARKER.

Petitioner argues that the decision in this case conflicts with the previous decisions of the Arizona Court of Appeals, Division One, in Vineyard v. Empire Machinery Co., 119 Ariz. 502, 581 P.2d 1152 (1978) and Brady v. Melody Homes Manufacturer, 121 Ariz. 253, 589 P.2d 896 (1978) and with the California Supreme Court's decision in Barker v. Lull Engineering Co., Inc., 20 Cal.3d 413, 143 Cal.Rptr. 225, 573 P.2d 443 (1978). However, a careful reading of Judge Howard's opinion in this case reveals that there is no such conflict.

In Barker the Court adopted a two-pronged standard to be applied in products liability design defect cases. The Court stated:

> "[A] product is defective in design (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when

> used in an intended or reasonably foreseeable manner, or (2) if the plaintiff proves that the product's design proximately caused his injury and the defendant fails to prove, in light of the relevant factors discussed above, that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design." 573 P.2d at 457-58.

The Court further stated that strict liability principles are applied in evaluating both prongs of the standard.

In Vineyard and Brady the Arizona Court of Appeals, Division One, adopted the two-pronged standard set forth in Barker. However, in Brady the Court held that while the first prong sounds in strict liability, negligence principles should be applied in analyzing the "risk-benefit" second prong. Thus, the only conflict between Barker and Brady centers around whether strict liability or negligence principles govern consideration of the second prong.

In the present case the Arizona Court of Appeals, Division Two, adopted the Barker and Brady two-pronged standard. The Court then applied the first prong of the standard to the facts of this case. The Court held that the Plaintiff proved that the dynamometer failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. Since liability was established under the first prong, the Court never even considered the applicability of the second prong. The Court said:

> We need not state here whether we agree with this apparent retreat from the doctrine of strict liability since we believe that the facts here established the applicability of strict liability under the first standard. (See petitioner's Writ, Appendix, p. 7.)

Because the Court of Appeals decided the present case under the first prong of

Barker, there is no conflict between this decision and the decisions of the Arizona Court of Appeals, Division One, and of the California Supreme Court. Each court agrees that strict liability principles apply to an analysis of the first prong of the Barker standard.

Petitioner further contends that this case cannot be factually distinguished from Vineyard and Brady, two cases in which the Court held that the "consumer expectation test" was not satisfied. However, those cases are clearly distinguishable from this case. In Vineyard the Plaintiff presented no evidence from which a jury could conclude that the compacting machine without a roll bar was "unreasonably dangerous." And in Brady, the Plaintiffs presented no evidence that the ordinary consumer would expect a mobile home to give warning of an impending

fire. In the present case, the Court held that there was sufficient evidence presented by the Plaintiff for a jury to conclude that the ordinary consumer would expect the dynamometer to perform safely under the circumstances where a worker's arm or limb came close to the "nip point" or "pinch" of the dynamometer rollers and wheels. There was evidence that there was no accessible automatic shutdown valve, no guard, and no extraction device, all of which could have been designed into the dynamometer. This evidence properly permitted a jury to conclude that an ordinary consumer had a right to expect that the dynamometer would be designed in such a way as to prevent a worker, such as Mr. Moorer, from becoming entrained in the rolling wheels.

Contrary to petitioner's assertion, this case is not inconsistent with Vine-

yard and Brady because in those cases there was no evidence from which a jury could conclude that the products were "unreasonably dangerous." In this case there was such evidence.[1]

2. ASSUMING ARGUENDO THERE IS A CONFLICT AMONG THE JURISDICTIONS IN PRODUCTS LIABILITY LAW, THIS CONFLICT DOES NOT BURDEN INTERSTATE COMMERCE.

Petitioner argues that the conflict among jurisdictions in products liability law amounts to state action burdening interstate commerce. However, the commerce clause of the United States Constitution, Art. 1, Sec. 8, Cl. 3, was enacted to prevent state legislative action

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[1]Of note is Chavarria v. Ford Motor Co., 124 Ariz. 158, 602 P.2d 826 (1979) in which the Court found that evidence of no roll-over protection on a Ford tractor plus evidence that the tractor had a propensity to tip provided a question of fact as to whether the tractor was unreasonably dangerous.

hindering interstate commerce. This case involves judicial common law not state statutes or regulations. Every case the petitioner cites involved a state statute which was challenged on the ground that it obstructed interstate commerce. See, e.g., Southern Pacific Co. v. Arizona ex rel Sullivan, 325 U.S. 761 (1945); California v. Zook, 336 U.S. 725 (1949). The petitioner cites no case in which a judicial decision not involving a state statute has been struck down as a burden on interstate commerce.

Even if judicial decision could be considered state action, petitioner overlooks the fact that the states have certain legislative powers involving commerce. The grant of commercial power to Congress does not contain any terms which totally deprive the states from exercising their power over interstate commerce.

Cooley v. Board of Wardens, 12 How. 299, 318 (1852). The Supreme Court has stated:

> "[I]t has been recognized that, in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce, or even, to some extent, regulate it." Southern Pacific, supra at 767.

State action in the field of consumer protection and safety has long been recognized as proper under the states' police power. See Pike v. Bruce Church, Inc., 397 U.S. 137, 143 (1970); Freeman v. Hewit, 329 U.S. 249 (1946). Certainly, state courts have the power to interpret products liability laws in such a manner as to protect the health of state residents.

Petitioner argues that uniform regulations of products liability law is necessary for the free flow of commerce,

and that conflicting laws in this area discriminate against interstate commerce. Petitioner cites Pike, supra, which involved an Arizona statute prohibiting growers from transporting uncrated cantaloups from Arizona to California for packaging, and Raymond Motor Transportation, Inc., et al v. Rice, Secretary, Department of Transportation of Wisconsin, et al, 434 U.S. 429 (1978) which involved a Wisconsin trucking regulation which barred the operation of 65-foot double trailer units in that state.

Petitioner also asserts that Clayton Manufacturing's commercial activities are burdened by the alleged conflict of laws among jurisdictions. However, petitioner has cited no evidence to support this contention; indeed, this record is

devoid of any evidence that petitioner's business will be affected if one state applies strict liability principles to the second prong of the Barker standard while another applies negligence principles.

Finally, the question raised by Petitioner was not raised at the trial court level nor during any of the state appellate proceedings, and, therefore, is not properly before this Court.

CONCLUSION

For these reasons, the request for grant of certiorari in this case should be denied.

Respectfully submitted,
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